



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

DRAFT – DO NOT RELEASE

By Electronic Mail: GGill-Austern@nutter.com
and First Class-Mail

Date

Gary L. Gill-Austern
Nutter McClennen & Fish LLP
155 Seaport Boulevard
Boston, MA 02210

RE: Aerovox TSCA Determination for the Non-Time Critical Removal Action

Dear Mr. Gill-Austern:

Thank you for your thoughtful letter dated September 2, 2016, in which you set out your position on the applicability of the Vacant Aerovox Plant Non-Time Critical Removal Action Final TSCA 40 C.F.R. § 761.61(c) Determination, dated December 24, 2009, (“the TSCA Determination”) to AVX’s current 21E cleanup at the Aerovox Site. As you know, the TSCA Determination was Appendix C to EPA’s Action Memorandum for the Aerovox Non-Time Critical Removal Action (“NTCRA”), and the Action Memorandum, along with its Appendices, was also attached to the Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action between EPA and AVX, which became effective on June 3, 2010 (“AOC”).

We have seriously considered all of the points raised in your letter, and taken a number of steps to ensure our understanding is complete about this important matter, including reviewing the TSCA Determination, the Action Memo and the AOC, and consulting with Region 1’s TSCA program. Below is our explanation of why we continue to maintain that AVX, in order to be compliant with TSCA regulations during the 21E cleanup, should contact EPA’s TSCA representative, Kim Tisa, to make arrangement for review and approval by EPA’s TSCA program of the appropriate 21E submissions.

Background

Subsequent to investigations and studies documented in an August 1998 Engineering Evaluation/Cost Analysis (“EE/CA”) and an April 2006 Supplemental Engineering

Evaluation/Cost Analysis (“SEE/CA”), EPA issued an Action Memorandum for a Non-Time Critical Removal Action in 2010 (“the Action Memo”) for the Aerovox Site. In general, the Action Memo called for demolition of onsite buildings, capping of the Site, and post-removal site controls including land and groundwater use restrictions and long-term maintenance and monitoring activities. The Action Memo also included a risk-based TSCA Determination issued under § 761.61(c) of TSCA. Concurrent with its preparation of the Action Memo, EPA issued a notice and demand letter to AVX for response costs at the Aerovox Site. As a result, AVX entered into settlement negotiations with EPA to undertake a portion of the work called for in the Action Memo. Because further cleanup would be needed to address Site contamination once the NTCRA work was completed, AVX also began settlement negotiations with the Commonwealth of Massachusetts to address the Site under the Massachusetts 21E program and with the City of New Bedford, owner of the Aerovox Site, for among other things, financial arrangements for some of the long-term care of the Site remediation. These negotiations resulted in three separate settlement agreements between AVX and EPA, AVX and the State, and AVX and the City of New Bedford.

Subsequently, AVX performed its portion of the NTCRA work, and EPA issued a Notice of Completion of the Work in May, 2013. Soon after, AVX began the 21E cleanup of the Site. While EPA does not have a direct oversight role in the 21E cleanup, we (along with our contractors) have participated in meetings, conference calls and site visits with AVX, MassDEP, the City of New Bedford and their contractors both because of EPA’s continuing involvement at the Site discussed below and because of the shared interest of all parties in cooperating and coordinating with each other given the significant risk of impacts the Aerovox Site may have on EPA’s cleanup of the New Bedford Harbor Superfund Site.

EPA’s Continuing Role at the Site As Recognized in the AOC

A. Post-Removal Site Control

Through the AOC, EPA continues to have a role at the Aerovox Site both during and after the 21E cleanup to ensure the NTCRA work remains protective and compliant with the TSCA Determination, as well as to ensure its understanding of the 21E cleanup as it informs EPA’s actions in planning and implementing the New Bedford Harbor Site cleanup. Paragraph 67 of the AOC provides for post-removal site controls including maintenance and monitoring of the NTCRA work during and after the 21E cleanup. The AOC defines post-removal site controls to mean “the measures that are necessary to ensure the effectiveness and integrity of the NTCRA after the completion of the removal action.”¹ To effect these particular controls, AVX proposed and, after lengthy discussions and revisions, EPA approved a Maintenance and Monitoring Plan, dated May 2013 (“MM Plan”) which sets out the roles and responsibilities for maintenance and monitoring at the Site. For example, during the 21E work, Section 2 requires AVX to

¹ See Section 1.3 of the MM Plan for a general discussion of the purpose and timing of the post-removal site controls that are the subject of the MM Plan.

conduct annual cap and containment barrier inspections and conduct any necessary maintenance; Section 6 requires that AVX submit documentation of those efforts to EPA. As you know, EPA representatives have attended those annual inspections. Once the 21E work is completed, Sections 3 and 4 set out long-term monitoring and maintenance requirements for groundwater, the Site cap and the containment barrier to ensure the NTCRA work remains protective and compliant with the TSCA Determination, again with reporting requirements to EPA as directed in Section 6. These requirements are independent of any conditions MassDEP may require for long-term monitoring and maintenance of components of the 21E cleanup.² Because the post-removal site controls are required to ensure the integrity and effectiveness of the NTCRA work and to ensure that it remains in compliance with the TSCA Determination, EPA maintains a continuing role in cleanup activities at the Aerovox Site pursuant to the AOC.

In addition, as the parties recognized in footnote 5 of the MM Plan, EPA's role as a regulatory agency does not end because it issued a TSCA Determination for the NTCRA work: "Should PCB impacts outside the boundary of the Site be identified during the 21E/MCP program (for example PCBs in soil or pavement on adjacent property to the south), the 21E/MCP response actions will address such circumstances *in compliance with TSCA* and such areas may be added to the long-term OMM Plan at that time." (*emphasis added*).

B. TSCA Compliance

As you correctly point out in your September 2 letter, because the TSCA program cannot be delegated by EPA to the State, a significant amount of time during our 2010 settlement negotiations was focused on providing AVX, to the extent possible, assurance that both the NTCRA work and the anticipated 21E work at the Site, if performed in accordance with conditions set out in the TSCA Determination, would satisfy TSCA's requirement under 40 CFR 761.61(c) that PCB-contamination not pose an unreasonable risk of injury to health or the environment. The intent of EPA's recognition of the anticipated 21E work was never to eliminate the need for TSCA compliance. Instead, EPA was able to set out in its TSCA determination a minimum set of standards or conditions at the Site that if complied with, would satisfy TSCA regulations. Specifically, the TSCA determination anticipated that the 21E work would include some

² Section 2 of the MM Plan states, "TSCA Determination Condition 5 requires that response actions under the 21E/MCP program involving penetrations of the capped areas be conducted in a manner that is protective of health, safety, public welfare and the environment and in accordance with the health and safety requirements of the MCP. It further provides that upon completion of the 21E/MCP work, any disturbed areas must be restored to meet at a minimum the capping requirements in the Action Memorandum. The Site cap must continue to function as a barrier to direct contact with underlying contaminated site soils and to minimize infiltration during the 231E/MCP period." Section 3 of the MM Plan states, "The TSCA Determination includes certain conditions for long-term monitoring and maintenance that must be met to ensure, in accordance with Section 761.61(c) of TSCA, that the NTCRA does not pose an unreasonable risk of injury to health or the environment. The implementation and maintenance of these conditions are independent of any conditions required for long-term monitoring and maintenance by MassDEP's approval of the RAO or ROS submittal."

type of engineered barrier, a containment wall, groundwater monitoring, and land and groundwater use controls, based on the then-understanding of Site conditions. As long as regulated PCB contamination is present at any Site, however, TSCA has a role regardless of whether or not there is a settlement agreement or a TSCA Determination in place. Should site conditions change, after the TSCA program has provided approval of certain work or after issuance of a TSCA Determination under § 761.61(c), the TSCA program re-evaluates regulatory compliance and prior risk-based determinations in light of the changed conditions.

Through the 21E investigations undertaken by AVX, and sediment sampling conducted in 2012 and 2015 by EPA in the Acushnet River along the Aerovox Site shoreline, information about the presence of DNAPL and off-site migration of PCB contamination has been discovered that now requires the TSCA program to re-evaluate the TSCA Determination. The risk-based determination issued under TSCA may no longer be protective based on the newly discovered conditions at the Site, including the presence of DNAPL both on- and off-site and the off-site migration of PCB contamination. EPA's TSCA program will need to re-evaluate conditions and proposed actions to address PCB contamination both on- and off-site to determine whether or not TSCA regulatory requirements have been met.³

c. Section XXI of the AOC

EPA's continued role at the Site is consistent with its CERCLA authority as set out in the AOC. Section XXI of the AOC (Covenant Not To Sue By EPA) provides AVX with a covenant not to sue or take administrative action by EPA pursuant to Sections 106 and 107(a) of CERCLA based on certain conditions. The discovery of DNAPL on the Site and the presence and migration of contamination off-site were unknown to EPA as of the effective date of the AOC and as set forth in the Action Memorandum and the administrative record supporting the Action Memorandum. In Section XXII (Reservation of Rights By EPA), EPA reserved its reopener rights based on unknown conditions or unknown information as described in that Section. While EPA has not exercised its rights under the reopener, given that the Aerovox Site is adjacent to the New Bedford Harbor Site, that the Aerovox Site is the primary source of contamination to the New Bedford Harbor Site, and that there is a significant risk of impacts from the Aerovox Site to the Harbor Site, EPA's Superfund program will remain engaged in reviewing the Aerovox Site 21E cleanup through communications with MassDEP, by attending meetings with both MassDEP and AVX, and through its TSCA program.

Next Steps

Because the 21E work is now transitioning from studying the nature and extent of contamination to actual remedial tasks, and given the challenging condition of addressing

³ The term "off-site" as used in this letter refers to any location not within the definition of "Site" as that term is defined in the AOC.

DNAPL, the TSCA program, in order to fulfill its function, requires a more formal role in overseeing the 21E work as it relates to addressing PCB contamination. Therefore, in order to perform its regulatory duties to ensure the ongoing 21E work is conducted in compliance with TSCA, review and approval of AVX's proposed work is necessary.

At this time, EPA's TSCA program is not requiring that AVX perform additional work to come into compliance. The TSCA program will also consider the filing of the August 2016 Phase III Remedial Action Plan, prepared by Brown and Caldwell, as a submission to EPA for review and approval for compliance with TSCA. EPA will provide comments on the submission by November 2, 2016. AVX should contact Kim Tisa directly to make arrangements for future submission of appropriate documents. Kim will also contact MassDEP to discuss a method for concurrent review and approval of documents, as is customary at 21E sites, for this coordinated review process.

EPA recognizes the complexity of the cleanup of the Aerovox Site and is also appreciative of the cooperative relationship AVX has exhibited in coordinating with EPA as the cleanup progresses. It is not EPA's intention to slow the progress of the 21E cleanup; instead, EPA encourages AVX to continue its efforts to address Aerovox Site contamination. As EPA moves forward with its dredging of the New Bedford Harbor Site, EPA believes it would be beneficial for the parties to meet to begin closer technical coordination of the two Site cleanups.

Should you have any questions about this letter, please contact me at (617) 918-1888.

Very truly yours,

Cynthia Catri
Senior Enforcement Counsel

cc via email:

Evan Slavitt evan.slavitt@avx.com
Marilyn Wade MWade@brwncald.com
Gerard Martin Gerard.martin@state.ma.us
Angela Gallagher Angela.gallagher@state.ma.us
Michele Paul michele.paul@newbedford-ma.gov
Ginny Lombardo lombardo.ginny@epa.gov
Elaine stanley.elainet@epa.gov
Kim Tisa tisa.kimberly@epa.gov